

that the large MSOs are beginning to exercise the leverage they possess as a result of their long-standing stranglehold on local distribution:

Operators warn that if existing programmers don't play ball on exclusivity, a new and similar network probably will. "There's more than one news service and more than one sports service now and more competition is inevitable," says an executive at one of the U.S.'s five largest MSOs. "We have choices and if one service doesn't want to work with us, we have other places we can go."<sup>50/</sup>

Given the structure of the marketplace as detailed by *Cable World* and analyzed by Prof. Waterman, his conclusion that program access should apply equally to all program suppliers is obviously correct. Thus, the Commission should make an appropriate recommendation that Congress amend Section 628 of the Communications Act.<sup>51/</sup>

Similarly, the Commission should recommend that Congress extend the program access provisions of the 1992 Cable Act so that they are applicable to not only satellite-distributed programming services, but all programming services regardless of the means of distribution. With coming increase in the use of fiber optics, microwave and other technologies for the distribution of video programming, limiting the program access provisions of the 1992 Cable Act and the Commission's implementing rules solely to those programmers that employ satellites for signal distribution no longer makes sense. In its *1994 Competition Report*, the Commission acknowledged the potential for abuse regarding

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<sup>50/</sup>"Raising the Exclusivity Ante," *Cable World*, at 1, 103 (July 15, 1996).

<sup>51/</sup>The only exception should be those programming services that are produced by the cable operator solely for its own use, and not for resale to others.

programming not delivered by satellite, and promised that "the Commission will monitor industry conduct regarding programming services that are not delivered via satellite transmission."<sup>52/</sup> WCA is aware of at least one case where access to programming distributed via microwave was denied to the local wireless cable system operator.<sup>53/</sup> The time is ripe for Congressional action closing this loophole.

**V. IF NECESSARY, THE COMMISSION SHOULD SEEK FROM CONGRESS AUTHORITY OVER INTERNAL CABLING DEVOTED TO A SINGLE MULTIPLE DWELLING UNIT, EVEN IF SUCH CABLING IS IN COMMON AREAS.**

As WCA has previously demonstrated to the Commission, wired cable operators have frequently exploited the wiring used to provide cable service as a weapon against emerging competition.<sup>54/</sup> The Commission has recognized that "[t]he purpose of the cable home wiring rules is to . . . allow subscribers to utilize the wires with competing MVPDs, thereby facilitating competition from these entities"<sup>55/</sup> and, in CS Docket No. 95-184, is proposing to re-examine its cable home wiring rules. That re-examination is essential if competition is to flourish in the multiple dwelling unit ("MDU") environment.

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<sup>52/</sup>*1994 Competition Report*, 9 FCC Rcd at 7532.

<sup>53/</sup>In that case, the programmer also was not vertically integrated, illustrating both flaws in Section 19 of the 1992 Cable Act

<sup>54/</sup>*See, e.g.* Comments of WCA, MM Docket No. 92-260, at 8 (filed Dec. 1, 1992); Reply Comments of WCA, MM Docket No. 92-260, at 2-3 (filed Dec. 14, 1992); Comments of WCA, CS Docket No. 95-6, at 27 (filed June 30, 1995).

<sup>55/</sup>*In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 95-61, FCC 95-491, at 97 n.553 (1995).

The comments submitted by those that compete with cable demonstrate beyond peradventure that the current cable home wiring rules are not achieving that objective in the MDUs.<sup>56/</sup> Although those comments do not always agree precisely on the specific relief necessary to achieve the Commission's pro-competitive objective, they are virtually unanimous that the single most effective step the FCC can take to address this problem is to divest the cable operator of control over that inside wiring which is dedicated solely to serving an individual subscriber's dwelling unit.

As noted by WCA and most other non-cable parties to that proceeding, the unavoidable reality of the marketplace is that structural limitations, fear of property damage and aesthetic considerations often discourage the MDU property owner from allowing multiple video programming distributors access to residents. This is true most often where existing wiring, particularly the so-called "separate wiring" devoted exclusively to serving a particular residence, is owned by the cable operator and can not be re-used by the alternative service provider.<sup>57/</sup> Hence, by divesting the cable operator of control over

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<sup>56/</sup>See, e.g., Comments of Liberty Cable Company, Inc., CS Docket No. 95-184, at 6-10 (filed March 18, 1996); Comments of OpTel, Inc., CS Docket No. 95-184, at 10 (filed March 18, 1996); Comments of the Independent Cable & Telecommunications Association, CS Docket No. 95-184, at 20 (filed March 18, 1996); Comments of the Wireless Cable Association International, Inc., CS Docket No. 95-184 and MM Docket No. 92-260, at 4-5 (filed March 18, 1996)[hereinafter cited as "WCA Wiring Comments"].

<sup>57/</sup>See, e.g., WCA Wiring Comments at 12-15; Comments of DIRECTV, Inc., CS Docket No. 95-184, at 2 (filed March 18, 1996); Comments of GTE, CS Docket No. 95-184, at 9 (filed March 18, 1996); Joint Comments of the Building Owners and Managers (continued...)

separate wiring, the Commission can remove the single largest obstacle faced by cable's competitors in MDUs -- the property owner's distaste for postwiring. Moreover, the Commission can do so in a manner that is perfectly consistent with the requirements of Section 16(d) of the 1992 Cable Act.

Specifically, WCA has proposed the following:

- The existing demarcation point for purposes of Section 16(d) should be moved to the wall plate of the particular unit. Thus, a resident in an MDU environment would be permitted to purchase, upon termination of service, any wiring that is within his or her particular unit, but not wiring within the walls or common areas.
- All wiring devoted to serving an individual unit between the junction with common wiring and the new Section 16(d) demarcation point would immediately upon adoption of new rules become subject to the control of the MDU property owner and could be purchased at replacement cost immediately.<sup>58/</sup>

Not surprisingly, the comments of the cable industry generally reject any notion that modifications to the FCC's inside wiring rules are necessary. Rather, those comments argue strenuously in favor of preserving a *status quo* that has served cable quite well, albeit to the detriment of competing multichannel video programming distributors and consumers.<sup>59/</sup>

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<sup>57/</sup>(...continued)

Association International, et al., MM Docket No. 92-260, at 12 (filed March 18, 1996).

<sup>58/</sup>Reply Comments of WCA, CS Docket No. 95-184 (filed April 17, 1996)[hereinafter cited as "WCA Wiring Reply Comments"].

<sup>59/</sup>Indeed, the nation's largest cable operator, Tele-Communications, Inc., has even requested that the Commission postpone this entire proceeding until it completes its rulemakings implementing the Telecommunications Act of 1996, notwithstanding the fact  
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The cable industry has opposed efforts to give each resident of an MDU effective control over the wiring devoted to his or her unit by claiming, among other things, that the Commission lacks authority to govern cabling extending beyond the interior premises of a consumer's individual unit. That argument has been effectively refuted -- the Commission has ample authority under the Communications Act of 1934, as amended, to afford a consumer control over all of the wiring devoted exclusively to providing service to his or her individual unit.<sup>60/</sup> Should, however, the Commission determine that it lacks authority to implement WCA's proposal, WCA urges the Commission to specifically report on that defect in the Communications Act and seek additional authority from Congress. Certainly, there can be no public interest justification for permitting continued abuse by wired cable of inside cabling in MDUs.

## **VI. CONCLUSION.**

In short, every indication is that wireless cable is emerging as an effective competitive check on the pricing and other practices of the cable monopoly, and that the coming introduction of digital compression and other new technologies will spur unprecedented

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<sup>59/</sup>(...continued)

that none of those rulemakings are directed at inside wiring. Comments of Telecommunications, Inc., CS Docket No. CS 95-184, at 1-2 (filed March 18, 1996).

<sup>60/</sup>*See, e.g.* WCA Wiring Reply Comments, at 8-14; Reply of Bell Atlantic, MM Docket No. 92-260, at 2-4 (filed June 3, 1993); Reply of the NYNEX Telephone Companies, MM Docket No. 92-260, at 3-4 (filed June 3, 1993).

growth in the industry. By adopting the specific proposals set forth above, Congress and the Commission can assure that the fat years predicted by the Chairman become a reality, benefiting wireless cable operators and consumers alike.

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